



FEDERAL ELECTION COMMISSION

11 CFR Chapter I

[Notice 2013-07]

Technological Modernization

AGENCY: Federal Election Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on whether to begin a rulemaking to revise its regulations in 11 CFR chapter I to address contributions and expenditures made by electronic means, such as by credit card, debit card, Internet-based payment processing, and text messaging; to eliminate or update references to outdated technologies; and similar issues. The Commission intends to review the comments received as it decides what revisions, if any, it will propose making to its rules.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register]. The Commission will determine at a later date whether to hold a public hearing on this Notice. If a hearing is to be held, the Commission will publish a notice in the Federal Register announcing the date and time of the hearing.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's website at <http://www.fec.gov/fosers>, reference REG 2013-01. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Amy L. Rothstein, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All

comments must include the full name and postal service address of a commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period.

FOR FURTHER INFORMATION CONTACT : Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION

The Federal Election Commission is publishing this Advance Notice of Proposed Rulemaking to obtain comments on whether to revise its regulations at 11 CFR chapter I to address electronic transactions. Specifically, the Commission is considering whether to update its regulations to reflect electronic transactions, such as those made by debit cards, credit cards, gift cards, Internet-based payment processing, and online banking.¹ Such a rulemaking could address the receipt, deposit, accounting, recordkeeping, reporting, redesignation, and reattribution of electronic transactions, as well as matching funds, conduit activity, and contributions by text message. The Commission is also considering whether to revise its regulations by eliminating or updating references to outmoded technologies such as telegrams and fax machines.

As a general matter, the Commission seeks to ensure that the regulated community is able to take advantage of evolving technological innovations, while ensuring that the use of the technology is consistent with the Federal Election Campaign Act, 2 U.S.C. 431 et seq., as amended, (“the Act”) as well as the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 et seq., and the Presidential Primary Matching

¹ See Rulemaking Priorities for 2012, Agenda Doc. 12-40 (May 24, 2012), http://www.fec.gov/agenda/2012/mtgdoc_1240.pdf.

Payment Account Act, 26 U.S.C. 9031 et seq. (collectively, “Chapters 95 and 96 of Title 26”). More specifically, here the Commission invites comments on whether and how it should update its regulations to take into account electronic transactions in a manner that provides sufficient guidance to the regulated community while reducing the need for serial revisions to reflect new and emerging technologies. Should regulations identify specific, approved means of engaging in electronic transactions? Or should regulations provide only general standards or criteria? Would the latter approach increase the risk of corruption, abuse, or circumvention of the Act, or Chapters 95 and 96 of Title 26, that may not be present with a bright-line rule that is less technologically flexible?

1. Updating Outmoded Regulations

The Commission is considering whether it should update its regulations to reflect recent technological advances. For example, certain regulations refer to technologies that are obsolete or seldom used today, such as a “telegram” (11 CFR 104.6(c)(1)); “typewriters” (11 CFR 114.9(d)); and a “carbon copy” of a check (11 CFR 102.9(b)(2)(iii)). Other regulations refer to technologies now used only in limited circumstances, such as microfilm, facsimiles and computer tape. See, e.g., 11 CFR 105.5 (microfilm copies provided by the Secretary of the Senate), 108.6 (microfilm or facsimile copies maintained by State officers). How should the Commission consider addressing these references to seldom used or obsolete technologies? What other, similar technological references in 11 CFR chapter I should the Commission consider updating or addressing in a rulemaking?

Several regulations refer to “writing,” “signature,” and “printing” requirements. The Commission is considering whether it should revisit these requirements to address

electronic documents and records. For example, Commission regulations provide a means for a contributor to redesignate a contribution in “a writing, signed by the contributor.” 11 CFR 110.1(b), 110.2(b); see also 11 CFR 110.1(f) (designations), 110.1(k) (joint contributions and reattributions). Other regulations require documents to be “signed” before being filed with the Commission, without explicitly providing for the possibility of electronic signatures. See, e.g., 11 CFR 111.4 (submission of complaints), 111.23 (designation of counsel), 300.37(d) (certifications by certain tax-exempt organizations). And some regulations apply to “printed” documents and communications without expressly addressing whether an electronic communication or an attachment to an electronic message, such as a portable document file or “PDF,” is “printed.” See, e.g., 11 CFR 104.7 (“best efforts”), 110.11(c)(2) (disclaimers for printed communications). The Commission invites comments on whether and, if so, how it should consider updating these provisions.

Previously, the Commission concluded that a particular method of obtaining redesignations of contributions through a combination of electronic and traditional means met the written signature requirements in the redesignation provisions at 11 CFR 110.1(b)(5) and 110.2(b)(5), because that method “provides a level of assurance as to the contributor’s identity and intent comparable to that of a written signature.”² At the same time, the Commission encouraged the use of innovations in technology to effectuate electronic redesignations and stated that it would consider, on a case-by-case basis, other methods of electronic redesignation.³ If the Commission decides to revise the redesignation regulations to include electronic redesignations, what other methods should

² See Interpretive Rule Regarding Electronic Contributor Redesignations, 76 FR 16233 (Mar. 23, 2011), available at http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-02.pdf.

³ Id.

it consider? How should the Commission revise the redesignation rules and other regulations that require “writings” or signatures in order to minimize the need for serial revisions to adapt to new and emerging technologies?

The Commission is also considering whether to revise regulations that require certain communications to be mailed or hand-delivered to the Commission without providing for the possibility of electronic transmission. See, e.g., 11 CFR 1.3 (Privacy Act requests), 112.1(e) (advisory opinion requests). Should the Commission update these regulations in light of current technology? If so, how?

2. Providing for Electronic Contributions and Transactions

The Act, Chapters 95 and 96 of Title 26, and Commission regulations generally refer to contributions by cash or check and to disbursements by check or draft without taking into account electronic transactions. Yet, according to the most recent triennial study conducted by the Federal Reserve System, payments by check have been decreasing and the “number of noncash payments in the United States . . . increased at a compound annual rate of 4.6 percent” from 2006 to 2009.⁴ Electronic payments – that is, payments made by debit cards; credit cards; automated clearinghouses; and prepaid debit, credit, banking, and gift cards – “collectively exceed three-quarters of all noncash payments” in the United States.⁵

Consistent with this trend, people increasingly use electronic means to contribute to political committees. A series of studies by the Pew Research Center of the 2006, 2008, and 2010 elections shows that the number of Internet users who make online

⁴ Federal Reserve System, 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006-2009 4 (Apr. 5, 2011), available at www.frb services.org/files/communications/pdf/press/2010_payments_study.pdf.

⁵ Id.

contributions to candidates is increasing.⁶ And among adults who donated to presidential candidates in the 2012 election, 50 percent donated online or via email.⁷ As of September 2012 – only a few months after the Commission had approved the use of text messaging to make contributions – ten percent of those who made contributions in the presidential race did so by “text message from a cell phone or cell phone app.”⁸

a. General Industry Practice

In light of these trends, the Commission is considering whether and how to revise its regulations to address electronic contributions and other transactions. As a preliminary matter, the Commission seeks information on general industry practice. How are commercial and consumer electronic transactions conducted generally? What are the industry standards, practices, and safeguards? How do vendors and third-party payment processors, such as PayPal, verify the payer’s identity and attribute payments made by credit card? What types and forms of information are typically collected and maintained? What are the standard practices of third-party payment processors, such as PayPal or Square? What are the intermediate steps in processing electronic transactions? Do vendors or third-party payment processors typically process multiple recipients’ funds through merchant accounts? What are the general timeframes for each step of these electronic processes? What are typical accounting practices with regard to merchant

⁶ See, e.g., Aaron Smith, Pew Internet and American Life Project, The Internet and Campaign 2010 21 (Mar. 17, 2011), available at <http://www.pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf> (finding that online contributions increased from three percent in the 2006 mid-term elections to four percent in 2010); Aaron Smith, Pew Internet and American Life Project, The Internet’s Role in Campaign 2008 38-39 (Apr. 15, 2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (showing that nine percent made online contributions).

⁷ Aaron Smith & Maeve Duggan, Pew Internet and American Life Project, Presidential Campaign Donations in the Digital Age (Oct. 25, 2012), available at http://www.pewinternet.org/~media/Files/Reports/2012/PIP_State_of_the_2012_race_donations.pdf (finding further that 67 percent donated in person, over the telephone, or through the mail).

⁸ Id.

accounts? How do these practices differ, if at all, for prepaid debit, credit, banking and gift card transactions? How might practices change in light of emerging technologies? Are there other forms of electronic payment – such as by electronic wallet or swipe,⁹ P2P (or person to person) platform,¹⁰ mobile app, or Twitter hashtag¹¹ – that the Commission should consider if it decides to revise its rules?

b. Political Committee Practice

The Commission also seeks information on how political committees receive electronic contributions. Do political committees' practices differ from general commercial industry standards and practices? If so, how do they differ? Are political committees' practices comparable to those of nonprofit organizations that receive electronic donations at the Federal, State, or local level? What legal or practical considerations or constraints drive any such differences? What role, if any, should commercial industry standards and practices play in the Commission's consideration of requirements for electronic contributions received by political committees?

The Commission also seeks information on recordkeeping practices for electronic transactions. Commission regulations require political committees to maintain records of contributions and disbursements in ways that do not explicitly account for electronic transactions. See, e.g., 11 CFR 102.9(a)(4) (requiring a "photocopy of each check or written instrument or a digital image of each check or written instrument"), 102.9(b)(2)

⁹ See, e.g., Tara Siegel Bernard & Claire Cain Miller, Swiping Is the Easy Part, N.Y. Times, Mar. 24, 2011, at B1, available at http://www.nytimes.com/2011/03/24/technology/24wallet.html?_r=0.

¹⁰ See, e.g., Fed. Fin. Inst. Examination Council, Online Person-to-person (P2P), Account-to-Account Payments and Electronic Cash, IT Examination HandBook InfoBase, [http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement/card-based-electronic-payments/online-person-to-person-\(p2p\),-account-to-account-\(a2a\)-payments-and-electronic-cash.aspx](http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement/card-based-electronic-payments/online-person-to-person-(p2p),-account-to-account-(a2a)-payments-and-electronic-cash.aspx) (last visited Feb. 26, 2013).

¹¹ See, e.g., Heather Kelly, Twitter and Amex to Let You Pay with a Hashtag, CNN (Feb. 12, 2013), <http://www.cnn.com/2013/02/11/tech/social-media/twitter-hashtag-purchases>; see also <https://chirpify.com/> (social media purchase platform).

(requiring records such as cancelled checks, receipts, and carbon copies for disbursements over \$200). Although the Commission has interpreted its recordkeeping regulations in the context of electronic transactions,¹² should the Commission revise these regulations to address expressly recordkeeping requirements for electronic transactions, such as, for example, requiring political committees that receive credit card contributions to maintain records with cardholders' names and credit card numbers? See, e.g., 11 CFR 9034.2(b) (requirements for credit card contributions eligible for matching funds). Would this requirement be consistent with current industry practices? Would it need to be updated periodically to reflect changing technology? What should the recordkeeping requirements be for contributions made by prepaid debit, credit, banking and gift cards? Should the regulations take a less specific approach, like that in 11 CFR 104.14(b), which requires records to "provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness"? Alternatively, are the current rules flexible enough to account for electronic recordkeeping practices without being revised?

Other recordkeeping considerations that arise in the context of electronic transactions relate to the use of merchant accounts. The Act and Commission regulations require all receipts to be deposited into a political committee's campaign depository account within ten days of receipt. 2 USC 432(h)(1); 11 CFR 103.3(a); see also 11 CFR 102.2(a)(1)(vi) (disclosure of campaign depositories). Although the Commission has

¹² See Advisory Opinion 1995-09 (NewtWatch) (approving a proposal to maintain records supporting electronic fund transfers); Advisory Opinion 1993-04 (Cox); Advisory Opinion 1994-40 (Alliance for American Leadership); see also Federal Election Commission, Campaign Guide: Congressional Candidates and Committees 75-76 (Aug. 2011), available at <http://www.fec.gov/pdf/candgui.pdf> (describing recordkeeping for credit card disbursements).

previously opined on the treatment of merchant accounts in specific factual situations,¹³ the Commission seeks information on the current uses of merchant accounts by political committees. Do contributions to political committees made via credit card or other electronic means customarily pass through a merchant account before being deposited by the committees in their campaign depositories? Should merchant accounts themselves be considered campaign depositories? Why or why not? How can an electronic contribution that is processed through a merchant account containing funds designated for multiple recipients be traced for recordkeeping, disclosure and audit purposes in a manner that provides assurances comparable to a “paper trail”?¹⁴

In several recent advisory opinions, the Commission has addressed electronic contributions to political committees that are processed by incorporated commercial vendors or payment processors. In some of these opinions, the Commission concluded that the transaction was permissible under 11 CFR 110.6, which prohibits corporations from acting as conduits or intermediaries, because the corporation was acting as a vendor to the political committee recipient.¹⁵ In other advisory opinions, the Commission concluded that the transaction was permissible because the corporations were providing services to the contributors.¹⁶ Most recently, the Commission explained that some contributions made through electronic payment processors were not subject to 11 CFR 110.6 because they were not contributions to an intermediary earmarked for a

¹³ See, e.g., Advisory Opinion 1999-22 (Aristotle Publishing) (concluding that political committees receiving credit card contributions through merchant account should disclose that account as a campaign depository).

¹⁴ See, e.g., Advisory Opinion 1993-04 (Cox), n. 2 (discussing recordkeeping and “paper trails”); Advisory Opinion 1999-22 (Aristotle Publishing) (approving a vendor’s use of a single merchant ID to process contributions subsequently forwarded to multiple political committees).

¹⁵ Advisory Opinion 2007-04 (Atlant); Advisory Opinion 2004-19 (DollarVote); see also Advisory Opinion 2012-09 (Points for Politics).

¹⁶ Advisory Opinion 2011-06 (Democracy Engine); Advisory Opinion 2006-08 (Brooks); see also Advisory Opinion 2011-19 (GivingSphere).

candidate.¹⁷ Should the Commission consider revising its regulations at 11 CFR 110.6 to address electronic contributions processed by incorporated commercial vendors and payment processors? If so, what approach should the regulations take? Should the regulations also address how to treat fees paid to commercial vendors and payment processors to process electronic contributions?

Other regulations that do not expressly address electronic contributions also have been interpreted by the Commission to apply to electronic transactions. In Advisory Opinion 1990-04 (American Veterinary Medical Association), for example, the Commission approved credit card transactions under 11 CFR 102.6, which addresses combined payments of contributions and dues by check. The Commission also has construed 11 CFR 102.8, which applies when a contribution is received, and 11 CFR 110.1(b)(6) and 110.2(b)(6), which describe when a contribution is made, in the context of electronic contributions.¹⁸ Should the Commission revise these regulations to address electronic contributions expressly? If so, should the regulations take the same approach as those taken previously? If not, why not, and what approach should they take instead?

Recently, the Commission approved the use of text messaging to process contributions in a series of advisory opinions.¹⁹ Should the Commission amend its regulations to address contributions made by text message? If so, should the regulations

¹⁷ Advisory Opinion 2012-22 (skimmerhat); but see Advisory Opinion Request 2012-08 (Repledge) (no advisory opinion issued).

¹⁸ Advisory Opinion 2012-35 (Global Transaction Services Group, Inc.); Advisory Opinion 2008-08 (Zucker); see also Advisory Opinion 2012-26 (Cooper for Congress, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-09 (Points for Politics); Federal Election Commission, Campaign Guide: Congressional Candidates and Committees 23, 74 (Aug. 2011), available at <http://www.fec.gov/pdf/candgui.pdf> (describing when a credit card contribution is “received”).

¹⁹ See Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-26 (Cooper for Congress, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-28 (CTIA – The Wireless Association); Advisory Opinion 2012-30 (Revolution Messaging, LLC); Advisory Opinion 2012-31 (AT&T Inc.).

take the same approach as the advisory opinions? Should any revised regulations also address issues that were not addressed in the advisory opinions, such as how political committees should report the receipt of contributions made by text message? What related issues should the Commission address?

The Commission is also considering whether and, if so, how to revise the paper-oriented definitions of “money” and determinations of “disbursement” in its regulations. For example, the regulatory definition of “contribution” defines “money” as “currency . . . , checks, money orders, or any other negotiable instruments payable on demand.” 11 CFR 100.52(c); see also 11 CFR 100.111(d) (similarly defining “money” in the definition of “expenditure”), 102.10 (requiring disbursements to be made by check or “similar draft” drawn on accounts established at the committee’s campaign depository). In several advisory opinions, the Commission has interpreted the term “similar draft” to include electronic disbursements.²⁰ Should the Commission revise its regulations to provide expressly that contributions, expenditures, and disbursements include funds transferred electronically? Should any revised regulations take the same approach as the advisory opinions? If not, why not, and what approach should they take instead?

Finally, the Commission is considering whether to revise its regulations that expressly apply only to cash contributions so that they also expressly apply to certain electronic contributions. For example, cash contributions in excess of \$100 are prohibited. 11 CFR 110.4. The Commission seeks comments on whether prepaid debit, credit, banking, and gift cards are functionally the same as cash. If so, should the

²⁰ See, e.g., Advisory Opinion 1993-04 (Cox) (approving a “computer driven billpayer service” that included the disbursement of funds by electronic transfer); Advisory Opinion 1982-25 (Sigmund) (concluding that a wire transfer qualifies as a “similar draft”).

regulation be revised to prohibit contributions in excess of \$100 made by prepaid debit, credit, banking, and gift cards? If not, why not?

c. Rulemaking vs. Other Guidance

The Commission seeks comments on whether a rulemaking is the best way for it to address questions raised by the receipt of electronic contributions, and the making of electronic disbursements, by political committees. As noted above, the Commission to date has provided guidance on electronic transactions largely through advisory opinions, interpretive rules, and campaign guides. Are these the best ways for the Commission to provide guidance on the subject in light of rapidly evolving technologies, or would rules on the subject also be helpful? How should the Commission craft regulations in order to minimize the need for serial revisions in the face of new and emerging technologies? Given the speed at which technology has been advancing, the Commission welcomes comments suggesting general regulatory criteria or standards that are flexible and adaptable enough to apply to new or emerging technology or business arrangements.

3. Other Electronic Modernization Issues

The Commission welcomes comments, including any pertinent data, concerning any electronic modernization issues that are not addressed in this notice and that relate to the Commission's administration of the Act or Chapters 95 and 96 of Title 26.

On behalf of the Commission,

Ellen L. Weintraub
Chair
Federal Election Commission

DATED: April 25, 2013
BILLING CODE: 6715-01-P

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